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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC., AND RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR THE PUYALLUP TRIBE AND RAMONA BENNETT

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BRIEF FOR THE PUYALLUP TRIBE AND RAMONA BENNETT

Opinions Below

The opinion of the Supreme Court of Washington, Appendix B of the Petition for the Writ of Certiorari, is reported in 86 Wn.2d 664, 548 P.2d 1058 (1976). The Memorandum Decision, Findings and Conclusions, and the Order and Judgment of the Superior Court for Pierce County, the Honorable William L. Brown, Jr., entered on December 23, 1974, and April 8, 1975, Appendices C through E of the Petition for the Writ of Certiorari [hereinafter Pet. Cert. App.], are unreported.

JURISDICTION

Jurisdictional Grounds

The judgment of the Supreme Court of Washington (Pet. Cert. App. B) became final, upon denial of motion for rehearing by a vote of seven to one, on June 25, 1976. (Pet. Cert. App. B-67). The petition for a Writ of Certiorari seeking review of a single question was filed September 22, 1976 and was granted November 29, 1976.[1] The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether, consistently with established principles of tribal immunity, a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and non-tribal fishermen.

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved are set forth in the Attachment to this brief.

STATEMENT OF THE CASE

This case arrives in this Court for the third time in its thirteen-year history. It was initiated originally by the Washington Departments of Game and Fisheries in the Superior Court for Pierce County against the tribe and certain named individuals seeking to enjoin alleged violations of state fishing laws. On certiorari here for the first time, this Court, viewing the case as one involving state power to regulate off-reservation fishing (391 U.S. at 396 n.11), ruled that a state prohibition against Indian net fishing could be sustained only as "a reasonable and necessary" conservation measure. *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392, 403 (1968).

On remand, the Department of Game assumed what the trial court called an "adamant" posture that Indians had no rights other than those of non-Indian citizens. The trial court denied injunctive relief on conservation grounds, ruling that the Game Department "had failed to give any consideration to Indian Treaty fishing rights as decreed by the Supreme Court." Memorandum Opinion of Rummel, J., November 24, 1970, Pierce County Superior Court. On appeal, the Washington Supreme Court upheld as reasonable a 1970 Fisheries Department regulation allowing limited Indian net fishing for coho salmon on the Puyallup River and a 1970 Game Department regulation precluding all Indian net fishing for steelhead.[2] *Department of Game* v. *Puyallup Tribe*, 80 Wn.2d 561, 497 P.2d 171 (1972). On certiorari for a second time, this Court held that the Department of Game's 1970 total prohibition against Indian net fishing for steelhead on the Puyallup was an invalid "discrimination" because "all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians, is allowed." *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44, 48 (1973).

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[1] Cross-petitions, seeking to raise issues pertaining to treaty entitlement to hatchery fish, were filed by respondents and were denied as untimely by the Clerk. A motion by the respondents for extension of time for filing cross-petitions was denied by Mr. Justice Rehnquist. Order of October 28, 1976.

[2] The Fisheries Department is charged with the regulation of the state's commercial fishery, principally salmon. *See* RCW 75.08.012. Steelhead trout are a game fish under the regulation of the Department of Game. *See* RCW 77.08.020.

The order of remand from this Court led to the first state recognized Indian net fishery for steelhead on the Puyallup River during the 1973-74 winter season, more than ten years after the initiation of the action, and more than five years after this Court made clear that state closures of off-reservation Indian fisheries must be justified by conservation needs.

Two federal adjudications, to which both the Department of Game and the Puyallup Tribe are parties, intervened some months before the instant case was tried for a third time in the summer of 1974. In February and March of 1974, Senior District Judge George H. Boldt of the Western District of Washington, in the exercise of his continuing jurisdiction over virtually all aspects of treaty fishing rights of more than 20 tribes in the region, entered a series of rulings affecting a wide range of issues—including tribal self-regulation, allocation of anadromous fish resources among treaty and nontreaty fishermen, and the power of the state to restrict off-reservation fishing for conservation purposes. *United States* v. *Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). Since the initial decision, Judge Boldt has exercised a continuing jurisdiction, ordering closures at various times of Indian and non-Indian fisheries, on and off reservation.[3] Congress has appropriated more than $6 million to implement the Boldt decision, a sizeable portion of which has gone to the Bureau of Indian Affairs for the purpose of strengthening the tribes' fisheries management programs. *See* House Comm.

[3] Between February 1974 and December 1976 the federal district court entered 56 orders in the exercise of its continuing jurisdiction.

on Appropriations, Department of the Interior and Related Agencies Appropriation Bill, 1976, H.R. Rep. No. 374, 94th Cong., 1st Sess. 32 (1975).

Presently pending before Judge Boldt, and referred to by the parties as Phase II of the treaty fishing litigation, are several environmental claims asserted by the tribes against the State of Washington. The claims are farreaching, involving the more than twenty tribes party to the Boldt litigation, six treaties, over fifteen rivers in the case area including several outside of Puget Sound, and all five species of anadromous fish reached by the treaties. The remedies sought include equitable relief against state action alleged to impair substantially the fish resources and fishing grounds that are subject of the treaties, and a declaration that all free-swimming fish, including those that are hatchery reared, are embraced by the treaty "right of taking fish." In an order and opinion of August 13, 1976, Judge Boldt enjoined state officials from basing any determination of numbers of harvestable fish available to treaty fishermen on anything other than total estimated runs of free-swimming fish, including hatchery fish, pending final determination of the Phase II claims. After one extension, a trial date on Phase II has been set tentatively for January 8, 1978. Discovery is proceeding consistently with normal rules governing complex litigation.

The second federal adjudication antedating the third trial of the instant case occurred in May 1974. The Court of Appeals for the Ninth Circuit entered a ruling in a separate lawsuit initiated in 1971 by the United States on behalf of the Puyallup Tribe against the state and a sports fishing group and its officers, seeking a declaration "that the Puyallup Indian Tribe

and its authorized representatives have exclusive right to, and regulation of, all fishing on or in the Puyallup River within the Puyallup Indian Reservation."[4] The complaint, reciting Department of Interior legal opinions that the bed of the Puyallup River within the original reservation boundaries was still held in trust by the United States for benefit of the tribe, *compare Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), prayed for injunctive relief enjoining the state and private defendants from exercising jurisdiction over, and interfering with, Indian fishing within reservation boundaries. Before the Ninth Circuit, the state challenged "the continued existence of the Puyallup Indian Reservation and, as a consequence, the right of the Puyallup Tribe of Indians to fish, free from State interference, on the part of the Puyallup River lying within the Reservation." *United States* v. *Washington,* 496 F.2d 620, 620 (9th Cir. 1974) (per curiam). The court rejected this claim and held that the reservation "continues to exist." *Id.* at 621. Certiorari was denied. 419 U.S. 1032 (1974).

The instant case was tried for the third time in the Pierce County Superior Court in June of 1974. On January 10, 1974, in an amended pleading, the Department of Game sought a declaration that it possessed the sole authority to regulate the taking of steelhead by the Puyallup Tribe on the Puyallup River. (App. 3). The Department of Fisheries filed no pleading and did not participate in the case. Complaints in intervention filed by two sportsmen's groups, Northwest Steelheaders Council of Trout Unlimited and the Western Steelheaders, Inc., made claims that sports

[4] Complaint, Civ. No. 39-71 (W.D. Wash.).

fishermen were entitled to all hatchery steelhead in the Puyallup River by reason of contributions to the hatchery program represented by sportsmen's license fees and excise taxes (App. 7).

By answer, filed on May 23, 1974 (App. 11), by motion for continuance filed before trial, at the trial, by motion for reconsideration, and by proposed findings and conclusions (Defendants' Proposed Findings and Conclusions 24-25), the tribe asserted that the intervening decision of the Ninth Circuit confirming the existence of the Puyallup Reservation mooted the remand because of the lack of state power to regulate on-reservation fishing. By these same procedural mechanisms, the tribe continuously asserted its sovereign immunity. Undisputed testimony at trial establishes that the tribal steelhead fishery occurs almost exclusively on the river within the exterior boundaries of the reservation. (App. 79; R. 773-74). The trial court acknowledged the Ninth Circuit's ruling that the Puyallup reservation "had not been terminated and extinguished,"[5] found that the tribe's intention is to take 90 to 100 percent of all its future steelhead harvest within the reservation boundaries (FF XVIII, Pet. Cert. App. D-17), averred that "the extent of [the treaty] right within the boundary of the former Puyallup Indian Reservation is not now before this court" (CL IV, Pet. Cert. App. D-20), but then concluded that treaty rights, even when exercised on-reservation, permitted the taking of no hatchery fish whatsoever and no more than 45 percent of the harvestable natural

[5] FF XVI, Pet. Cert. App. D 16-17. In his Memorandum Decison (Pet. Cert. App. C-37), however, the trial court concluded that an earlier state court opinion that the Puyallup Reservation no longer exists was "the law of this case."

run. By the court's computation this came to an annual tribal catch of 3,310 fish[6] or perhaps 3,280 fish.[7] The trial court assumed a continuing jurisdiction to regulate the on-reservation steelhead fishery for purposes of both conservation and allocation, and ordered the tribe to file with the court an authenticated roll of authorized fishermen and weekly catch reports during the steelhead season. FF VIII, Pet. Cert. App. D-11; FF XXI, Pet. Cert. App. D-18; CL VII, Pet. Cert. App. D-21; Order and Judgment, Pet. Cert. App. E 3-4. While this case was *sub judice* before the Washington Supreme Court, during the 1975-76 winter steelhead season the trial court exercised its continuing jurisdiction over the on-reservation fishery and entered a temporary restraining order against further treaty fishing on a finding that the tribe "has exceeded its treaty entitlement of 2,866 steelhead for the 1975-76 winter steelhead run." Order of February 3, 1976. On February 6, 1976, the trial court entered another order directing the Puyallup Tribe, through its officers, to enact a closure of tribal steelhead fishing and to enforce it. This was followed, on February 27, 1976, by a judgment reiterating the closure directive and directing the Department of Game to take on-reservation enforcement action.

After the grant of certiorari in the instant case on November 29, 1976, the Pierce County Superior Court has continued to exercise its powers against the tribe's on-reservation steelhead fishery. On application of the Game Department, the court on December 14, 1976, entered a temporary restraining order directing the

[6] FF XXII, Pet. Cert. App. D-19.

[7] Order and Judgment, Pet. Cert. App. E-3.

tribe to close its fishery and to enforce the closure. On December 22, 1976, the trial court entered a "closure order," declaring that "the Puyallup Tribe and its members treaty entitlement to the 1976-77 steelhead run in the Puyallup River is 670 steelhead as established under the court's formula previously entered in this matter." The court found that the tribe had exceeded its 670 fish entitlement, ordered the tribe to cease net fishing in the Puyallup River, and authorized on-reservation enforcement activity by the Department of Game. The injunction also contained a provision declaring that any catch in excess of the 670 fish limit "may be offset" against future tribal catches.

With the single exception of the steelhead run on the Puyallup River, state authorities in the last several years have never sought to invoke the powers claimed here to curtail on-reservation fishing. Routinely, treaty fishing disputes are referred to, and disposed of, by the federal district court in the exercise of its continuing jurisdiction. *See* note 2, *supra*.

The steelhead that is the subject of this controversy is an anadromous trout, spawned naturally in fresh water streams and rivers. Normally, after two years in a freshwater environment the steelhead will migrate to salt water for another two years, returning to the place it was born to spawn. (FF V, Pet. Cert. App. D-10). Unlike the salmon, a small number of steelhead spawners, perhaps 5 to 20 percent (*Id.; see* R. 198, 200, 630-31), may survive the spawning act and migrate again to salt water. The State of Washington classifies steelhead as a game fish, RCW 77.08.020, and forbids commercial trafficking in it. RCW 77.16.040. Steelhead destined for South Puget Sound waters of the Puyallup River are nonetheless subject to a heavy com-

mercial fishery, principally foreign fishing on the high seas (App. 52; R. 323, 379-80). Steelhead also are caught in Washington waters incidental to the commercial catch of salmon. (R. 116). Perhaps 5 percent of the steelhead smolt migrating from the Puyallup River will return to spawn (R. 102-03, 421).

The steelhead catch in western Washington is but a fraction of the overall catch of four species of salmon (chinook, silver, chum and pink). In 1971, for example, 246,000 steelhead were caught and 7,777,000 salmon, with steelhead representing only 3.3 percent of the total steelhead-salmon take (App. 36; R. 209-10). Steelhead make up perhaps 10 percent of the total Puyallup tribal salmon-steelhead fishery (R. 943, 1061). Because of its location in South Puget Sound at the end of the migration routes, the Puyallup tribal fishery has access only to stocks surviving commercial and sport fisheries occurring earlier. The reservation is found in the lower reaches of the river (FF XVII Pet. Cert. App. D-17, R. 756-57),[8] and the Indian steelhead fishing occurs there. (App. 79, R. 773). Sports fishing occurs on the reservation (R. 811) and at points upriver (R. 115). Indian closures on the weekends (R. 768, 809) and some net fishing at night (App. 64, R. 509-10) help reduce conflicts between the two user groups.

Proof at trial during June 1974 established that there are 20 full time tribal fishermen, 20 more who fish on a part time basis, and 20 others who fish occasionally but rely heavily on different runs for income

[8] The Muckleshoot Reservation is located in the upper reaches of the watershed on the White River (R. 917). The tribe argued to the trial court and on appeal that the Muckleshoot Tribe was an indispensable party to any allocation decision. The court below did not address the point.

(FF XV, Pet. Cert. App. D-16; R. 758-60). The 20 full time fishermen support not only themselves and their families but also another 10 families. (R. 759). As many as 150 members of the tribe are supported by these year round fishing activities. (R. 759). The income of tribal members is low, and is heavily dependent upon fishing opportunities. (R. 760-61). While steelhead make up only 10 percent of the total tribal catch, each fish brings approximately $10 on the commercial market (App. 92; R. 1048-49). The steelhead is important economically and for subsistence purposes because it is the only fish in the river during the months of December and January (*See* R. 337, 792-93, 896).

The Puyallup Tribe is organized under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 987, Attachment 3a, now codified as 25 U.S.C. § 476. (R. 754). The tribe has approximately 850 members according to figures of the Bureau of Indian Affairs (R. 755). Under the tribe's constitution and bylaws, the council exercises governing responsibilities. (R. 754). The chairperson of the tribe, Ms. Ramona Bennett, is a member of the council (R. 755) and testified at trial. The tribe has regulated its fisheries for a number of years by enactment of ordinances, and openings and closures. (R. 762-73, 777, 779, 801, 803-05, 900, 905, 924-25; Exh. 74-P, 74-Q). Indeed, the regulation enacted by the Game Department approving a tribal steelhead fishery for the 1973-74 season following this Court's decision in *Puyallup II* borrowed heavily from existing tribal ordinances. (R. 489, 802). Biological expertise for tribal management of its fisheries is provided by the Northwest Indian Fisheries Program of the United States Fish and Wildlife Service, whose director testified at trial. (R. 671-753, 960-1063). The

chief witness for the Game Department described the 1973-74 Puyallup River tribal steelhead fishery as "rather orderly," with closed periods being honored "very carefully." (R. 1103-04, 802).

The tribe now fishes under the auspices of the federal court decision of Judge Boldt, which calls for information exchanges among parties and the filing of tribal and state fishing regulations with the court. *See* 384 F. Supp. at 420. At the time of trial in the instant case, occurring some three months after the initial Boldt decision and before the major autumn fisheries, the tribe was without a biologist apart from the experts provided by the Northwest Indian Fisheries Program (App. 89-90; R. 768, 811, 924, 934) and had engaged in no steelhead or salmon hatchery planting programs (*see* R. 768, 896). In the two and a half years since trial these facts have changed:[9] the tribal fisheries management office now has a staff of ten, including two biologists. The office has commenced its own data collection system, including catch data and stream surveys, and has undertaken an enhancement program to rebuild depleted fishing stocks. During 1976, over 200,000 salmon were planted by the tribe in various tributaries of the Puyallup watershed. The Council has adopted a Fisheries Management Code, and each spring adopts annual fishing regulations for the upcoming season; these are updated by emergency regulations throughout the season, which have been adopted on approximately a dozen occasions each of the three fishing seasons since the trial. The tribe now employs two full time and one part time enforcement officers, and receives the services of one Bureau of Indian Affairs officer who is assigned to the tribe.

[9] These are representations of counsel.

The tribal steelhead net fishery, by all accounts, is accomplished without trespassing on private lands. The Puyallup fishermen anchor their set nets to bridges and employ small boats to place their drift nets. (*See* App. 86; R. 486-87, 805). Obviously, the fishing takes place in the river and thus within trust lands. The trial court's finding that the tribe intended to take 90 to 100 percent of its future steelhead harvest within the reservation boundaries (FF XVIII, Pet. Cert. App. D-17) is predicated on the fact that there is no need to go elsewhere because the fish migrate through the reservation (App. 79-80; R. 773). The actual steelhead catch by tribal fishermen for the 1973-74 season was estimated by the U.S. Fish and Wildlife Service to be approximately 1,900 fish (R. 971-72), although the Department of Game put the figure at roughly 3,000 (R. 1103). In any event, the tribal catch did not exceed the 3,300 fish allocation ordered initially by the trial court. (FF XXII, Pet. Cert. App. D-19; Order and Judgment, Pet. Cert. App. E-3).

Proof at trial dwelt mostly on the respective sizes of natural and hatchery steelhead runs in the Puyallup River, the funding origins of the hatchery plants, the interrelationships between hatchery and natural fish, and the reliability of methods for distinguishing between the two. Factual representations made to this Court during argument in *Puyallup II*[10] are revised substantially by the present record: the size of the

[10] 414 U.S. at 48.

At oral argument counsel for the Department of Game represented the catch of steelhead that were developed from the hatchery program were in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the catch of that program was financed by license fees of sports fishermen.

natural run, assumed to approximate 4,000-6,000 fish during the second appeal of this case, 80 Wn.2d at 572, 497 P.2d at 178, was fixed by the trial court at 14,715 fish (FF XII, Pet. Cert. App. D 14-15), in light of estimates extracted from the Game Department of a combined natural-hatchery run of 56,000 fish (Exh. 74-U; *see* R. 1065-67). The size of the hatchery steelhead run was found to represent not 60 or 80 percent of the total run but only 50 percent. (FF XI, Pet. Cert. App. D 14). The state game fund supports approximately two thirds of the operating costs of the Game Department's statewide steelhead program. (App. 30-31; R. 144-46). Altogether hunting and fishing license fees account for 75 to 80 percent of the operating funds of the Department of Game (FF IV, Pet. Cert. App. D 9-10), with about half of the revenue coming from hunting licenses and half from licenses relating to fishing. (*See* R. 164, 232.) Steelhead fishermen account for approximately 25 percent of the funds derived from fishing licenses. (Most sportsmen fish for trout.) (*See* R. 233, 238). Stated another way, steelheaders account for 10 percent of the entire Game Fund (App. 40; R. 164, 240-41), not the 80 percent suggested to the Court in *Puyallup II*. On a capital investment basis, according to the principal witness for the Department of Game, the replacement value of the Department's steelhead hatchery program facilities is $33 million, three-fourths of which is accounted for by federal and mitigation money compensating for fisheries resources destroyed by hydroelectric and other projects. (R. 133-37). If forced to rely on state funding alone, the Department would be able to produce only slightly in excess of 1 million of the current annual steelhead production of 5 million smolts (*See* FF IX, Pet. Cert. App. D-12; App. 55-56, R. 404-06).

RULINGS BELOW

Throughout the trial and in several post trial submissions, the petitioners, defendants below, argued the issues raised here of lack of state power to regulate fishing on-reservation and tribal sovereign immunity. These contentions were rejected by the trial court (Memorandum Decision, Pet. Cert. App. C-51; Findings and Conclusions, CL I, Pet. Cert. App. D-19, CL VII, Pet. Cert. App. D-21; Order and Judgment, Pet. Cert. App. E-3) and by the state Supreme Court (86 Wn.2d at 668-69, 678-79, 687-88, 548 P.2d at 1063, 1069, 1074, Pet. Cert. App. B 5-8, 27, 43). In the opinion of the Supreme Court of Washington, tribal sovereign immunity and on-reservation jurisdictional objections were without merit for two reasons: first, the court read this Court's rejection of sovereign immunity claims in *Puyallup I* (391 U.S. at 396 n.11) as still controlling because the case was analogized to "a suit to enjoin violations of state law by individual tribal members fishing off the reservation." 86 Wn.2d at 668, 548 P.2d at 1063, Pet. Cert. App. B-6. Second, the court read the remand in *Puyallup II* as mandating an allocation of the entire steelhead run, and enforcement of that allocation by state authorities without regard to reservation boundaries. *Id.* at 668, 548 P.2d at 1063, Pet. Cert. App. B-6. On the issue of the treaty applicability to hatchery fish,[11] various reasons were assigned for denying an Indian entitlement. The disposition of the state Supreme Court, with one important qualification, was to affirm the judgment of the trial court in all respects. The qualification took the form of a direction to the Department of Game to de-

[11] Certiorari was not sought on this second issue. See pp. 38-40 *infra*.

termine annually the size of the natural steelhead run on the Puyallup River and the number of fish represented by the tribe's share (45 percent), and to enforce that allocation. 86 Wn.2d at 686, 688, 548 P.2d at 1073-74, Pet. Cert. App. B 41, 44.

Chief Justice Stafford joined by three other justices concurred in the result on the ground that *Puyallup II* mandated an apportionment between treaty and non-treaty fishermen of the entire steelhead run. "At first blush," Chief Justice Stafford wrote, "it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court," citing such cases as *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), and *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968). But Chief Justice Stafford assumed nonetheless that *Puyallup II* must be read as repudiating *sub silentio* this line of authority: "If the Supreme Court had not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce." 86 Wn.2d at 689-90, 548 P.2d at 1075, Pet. Cert. App. B 46-48.

Justice Rosellini, concurring in part and dissenting in part, reasoned that the Treaty of Medicine Creek could not have reserved an exclusive right to fish and control fishing on-reservation, pointing out that such a right is reserved with specificity in the Walla-Walla Treaty. *Id.* at 693, 548 P.2d at 1077, Pet. Cert. App. B 55-56. He would find a denial of equal protection to other citizens in any treaty right that gives Indians superior rights. *Id.* at 694, 548 P.2d at 1077, Pet. Cert. App. B 57-58.

SUMMARY OF ARGUMENT

I

The decision below, authorizing state regulation of on-reservation fishing, flouts settled principles of Indian law well understood since the early days of the Republic. The test of validity of a state regulatory measure on the reservation, repeatedly applied by this Court, is whether it impairs a federally reserved right or interferes with tribal self-government.

This standard is twice fatal to the exercise of state power here asserted against the tribe. The Treaty of Medicine Creek, 10 Stat. 1132, reserved exclusive fishing rights on the reservation to the tribe, and there is not a shred of statutory support for the claim that Congress has rescinded that original commitment. Indeed, the notorious Public Law 280. Attachment 2a, authorizing deep intrusions of state authority into on-reservation activities, specifically protects rights of the tribes to regulate their own fishing. 18 U.S.C. § 1162 (1970); 25 U.S.C. § 1321(b) (1970). The decision below cheapens these federally reserved rights severely, and does so with a series of mandates that reduces tribal self-government to a mockery. The case law, overwhelmingly and without exception, disavows state attempts to control on-reservation fishing.

II

Even off the reservation, this Court has made clear that the state must demonstrate "that its regulation is a reasonable and necessary conservation measure, . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine* v. *Washington,* 420 U.S. 194, 207 (1975) (emphasis in original). The

allocation and enforcement aspects of the decision below do not purport to meet this standard, and plainly could not do so on this record. The decision would be wrong were it applied to an off-reservation fishery, and it is twice wrong because it is applied to an on-reservation fishery. Language in the opinion suggesting that there are no treaty rights to net fish, and the theory espoused in support, frankly defies earlier decisions of this Court and disinters arguments put to rest as long ago as *United States* v. *Winans*, 198 U.S. 371 (1905).

III

Wholly apart from the question of the reservation fishery, the decision of the Washington Supreme Court offends well established principles of tribal sovereign immunity by extinguishing tribal rights in more than three-fourths of the harvestable steelhead in the river and imposing other administrative burdens. A suit in state court against the tribe to decree an allocation of one of the Puyallup River salmon runs would be subject to summary dismissal on sovereign immunity grounds. The result should not be different where, as here, an action initiated more than thirteen years ago gradually evolves into an attempted adjudication of tribal community fishing rights. The tribe's sovereign immunity argument was rejected by this Court in *Puyallup I* only on the assumption that the case was analogous to the prosecution of individual Indians for crimes committed off reservation lands. 391 U.S. at 396 n.11. This premise is shattered by the present record: the fishing here occurred on-reservation, individual fishermen had nothing to do with the case, and the issues involved solely federal treaty rights.

IV

Principles of collateral estoppel, alone and in combination with the other grounds, foreclose the state from reasserting the power to regulate the tribal steelhead fishery. Washington State already has litigated and lost the question of the continued existence of the reservation and its power to regulate the on-reservation fishery. *United States* v. *Washington*, 496 F.2d 620 (9th Cir.) (per curiam), *cert. denied*, 419 U.S. 1032 (1974). By authorizing state officials to divide up the fishery and to enforce these decisions on-reservation, the decision below permits the reassertion of an authority previously withheld by a fully contested federal judgment. This is but the most recent arrival in the long line of theories in this litigation making determined inroads upon federally protected rights.

V

Certiorari was sought on the single question of state power to regulate on-reservation fishing, and review should be confined to that issue. Dismissal of the case on jurisdictional or sovereign immunity grounds would make it unnecessary to explore the grounds for allocation. This conclusion is reinforced by intensely practical considerations. The issue of treaty entitlement to hatchery fish under all the Northwest Indian treaties is presently being litigated in the federal district court and ought to be resolved there.

ARGUMENT

I

State Administrative Agencies and Courts Are Without Power To Adjudicate Tribal Entitlement to On-Reservation Fisheries and To Enforce the Decrees

By holding that state authorities may regulate tribal fishing on the reservation, the court below contradicts settled principles of Indian law going back to the early days of the Republic. The concurring opinion of Chief Justice Stafford recognizes the problem by acknowledging that "it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court." 86 Wn.2d at 689, 548 P.2d at 1075, Pet. Cert. App. B 46-47. Indeed, state authorities have conceded the very point they are rearguing here in the ongoing treaty fishing litigation in the federal district court[12] and for that matter more than thirty years ago before this Court in *Tulee* v. *Washington,* 315 U.S. 681, 683 (1942).[13]

By reading *Puyallup II* as discarding this unbroken line of precedent, the state Supreme Court departed from well established principles protecting the authority of an Indian tribe to regulate the conduct of its members free from state interference. *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832), of course

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[12] *See* 384 F. Supp. at 341:

> All parties in this case agree that on-reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case.

An identical concession was made by Counsel at trial in the instant case. *See* App. 20-21; R. 20-21.

[13] "The state does not claim power to regulate fishing by the Indians in their own reservation."

makes clear that the tribes are recognized as "distinct, independent, political communities" qualified to exercise powers of self-government "not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignity." F. Cohen, *Handbook of Federal Indian Law* 122 (1942). This principle has survived in decisions of this Court through *Ex Parte Crow Dog,* 109 U.S. 556 (1883), holding that tribal courts alone had jurisdiction over the murder on-reservation of one Sioux Indian by another, and *Williams* v. *Lee,* 358 U.S. 217 (1959), forbidding the exercise of state court jurisdiction over a suit by a non-Indian to collect on a debt incurred on-reservation, to *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164 (1973), barring the imposition of a state income tax on earnings of Indians derived from on-reservation activities. Whether the theory be one of tribal sovereignty or federal preemption by treaties and statutes, *see id.* at 172, the questions to ask, according to *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973), are whether the particular state initiatives would "interfere with reservation self-government or would impair a right granted or reserved by federal law." Only last term the Court applied this teaching to foreclose state court jurisdiction over an Indian adoption proceeding where the parties resided on-reservation and the conduct occurred there. *Fisher* v. *District Court,* 424 U.S. 382, 386 (1976) (per curiam); *see Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463, 480-81 (1976). *See also Seymour* v. *Superintendent,* 368 U.S. 351 (1962).

That the exercise of state power here at issue erodes rights federally reserved is, we submit, overwhelmingly

clear. Not only can the state identify no federal statutory authority justifying this unprecedented encroachment upon on-reservation Indian fishing activity, the legislation that can be found points the other way. The starting point of course is the Treaty of Medicine Creek reserving to the tribe the "exclusive use" of reservation lands, 10 Stat. 1132 (1854), Attachment 1a-2a, and along with it exclusive powers to control on-reservation fisheries. *Menominee Tribe* v. *United States,* 391 U.S. 404, 405-6 (1968); *United States* v. *Winans,* 198 U.S. 371, 381 (1905); *United States* v. *Washington,* 520 F.2d 676, 690 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). The state that is here claiming the power reserved to the tribe by federal treaty was not admitted to the union for another thirty-five years, and then by an enabling act preserving existing rights of the Indians. 25 Stat. 676, 677 (1889).[14] Although the Congress from time to time has invited the exercise of state powers over certain on-reservation activities, the conditions of these waivers must be carefully read, *see Kennerly* v. *District Court of Montana,* 400 U.S. 423 (1971) (*per curiam*), and none comes close to authorizing the interference with federally protected rights contended for here. The well known Public Law 280, 67 Stat. 588 (1953), surrendering jurisdiction over Indian country to the states under certain circumstances,[15] specifically withholds from the state civil, 25 U.S.C. § 1322(b) (1970), and criminal courts, 18 U.S.C. § 1162 (1970), the power to

[14] A comparable provision appears in the Washington State Constitution, Article XXVI.

[15] It is subject to judicial notice that the Puyallup Tribe never has consented to the assumption of 280 jurisdiction by the state. *See* 25 U.S.C. § 1322(a) (1970).

adjudicate rights in tribal natural resources. The words of 18 U.S.C. § 1162 (1970) repeated verbatim in section 401(b) of the Civil Rights Act of 1968, 82 Stat. 78-79, 25 U.S.C. § 1321(b) (1970) [16] hardly could be more specific:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Notwithstanding these mandates, the state in the past repeatedly has applied its civil and criminal processes to interdict tribal fishing on the river. *See* R. 777-78, 824-26; *United States* v. *Washington,* 384 F. Supp. 312, 358, 388 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). By inviting state authorities to close fisheries on the reservation and to enforce these edicts, the court below continues to sanction an interference with federally protected rights that is at war with the specifics of the Treaty of Medicine Creek and longstanding congressional policies carefully hedging the reach of state authority on federal Indian reserves. *Compare Metlakatla Indian Community* v. *Egan,* 369 U.S. 45, 58 (1962) (reading Public Law 280 as disclaiming "the intention to permit states to interfere with federally granted fishing privileges or use of properties").

Nor is there any doubt that the state power applied here encroaches heavily on the Indians' right "to make

[16] An identical disclaimer of state jurisdiction as regards Indian fishing appears in RCW 37.12.060. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L. Rev. 535, 547 (1975). The provision was cited in the briefs below but not in the opinions.

their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 220 (1959); *see Bryan* v. *Itasca County,* 96 S. Ct. 2102 (1976). Indeed, one wonders what remains of the tribe's power to govern itself under the terms of Section 16 of the Indian Reorganization Act of 1934, Attachment 3a-4a, *infra,* 25 U.S.C. § 476 (1970). The state courts have asserted nothing short of an authority to nullify tribal regulation of the single activity that is indispensable to the economic well being of the members and their traditional values. It is difficult to conceive of an intervention in tribal self-government more demeaning and decisive than an order to its governing body to enact and enforce an ordinance curtailing the membership's chief economic activity. This is not a tax on income earned, as was condemned in *McLanahan,* but a ban on earning income. The court below has approved the exercise of a continuing jurisdiction, replete with administrative details, that places the practical governance of an important tribal fishery in the hands of state officials whose hostility has been clearly recorded. *See United States* v. *Washington,* 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976) (Burns, J., concurring) ("The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington state officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court"). In the years following the *Puyallup II* decision, the tribal share of steelhead has been recomputed downwards by state authorities in rapid succession to be 3310 or 3280 fish (1974-75), then 2866 fish (1975-76) and now 670 fish (1976-77). These "allocations" are made despite the acknowledged inability

of the Department of Game to predict run size. (App. 53, R. 380-81, 775, Exh. 74-R). *Puyallup I* and *Puyallup II* record the eventual point of satisfaction of this untrammeled state power.

The judgment below, by authorizing state control over an on-reservation fishery, conflicts either with direct holdings or considered dicta of an unbroken line of authority, including decisions of this Court, *Menominee Tribe* v. *United States,* 391 U.S. 404, 411 n.12 (1968) ("the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress"); *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918) (affirming restraint against non-Indian encroachment upon reservation fisheries); decisions of the lower federal courts, *United States* v. *Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976); *Kimball* v. *Callahan,* 493 F.2d 564, 568 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974) (even though the former reservation lands in question were "no longer legally occupied by the Klamaths"); *Moore* v. *United States,* 157 F.2d 760 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1947); *Colville* v. *Washington,* 412 F. Supp. 651 (E.D. Wash. 1976); *Quechan Tribe* v. *Rowe,* 350 F. Supp. 106 (S.D. Cal. 1972); *Leech Lake Band of Chippewa Indians* v. *Herbst,* 334 F. Supp. 1001 (D. Minn. 1971); *Klamath & Modoc Tribes* v. *Maison,* 139 F. Supp. 634 (D. Ore. 1956), *modified,* 338 F.2d 620 (9th Cir. 1964); *Mason* v. *Sams,* 5 F.2d 255 (W.D. Wash. 1925); *United States ex rel. Lynn* v. *Hamilton,* 233 Fed. 685 (W.D.N.Y. 1915); *In re Lincoln,* 129 Fed. 247 (N.D. Cal. 1904); *In re Blackbird,* 109 Fed. 139 (W.D. Wis. 1901); *Oneida Tribe of Indians* v. *United States,* 165 Ct. Cl. 487,

cert. denied, 379 U.S. 946 (1964); and of the state courts, *Donahue* v. *California Justice Court,* 15 Cal. App.3d 557, 93 Cal. Rptr. 310 (1971), *cert. denied,* 404 U.S. 990 (1971); *see People* v. *Jondreau,* 384 Mich. 539, 185 N.W.2d 315 (1971). There is, in short, not a shred of precedent for the assertion of state power here involved, as prior concessions so thoroughly attest.

In *Mattz* v. *Arnett,* 412 U.S. 481, 506 (1973), this Court held that the Klamath Indian Reservation had not been terminated by Act of Congress and therefore remained "Indian Country" for purposes of 18 U.S.C. § 1151. The Court pointed out, however, that it was deciding nothing regarding the existence of Mattz's fishing rights or the application of California law notwithstanding the reservation status, 412 U.S. at 485, although on remand the state court applied the general rule foreclosing state jurisdiction over on-reservation fishing. *Arnett* v. *Five Gill Nets,* 48 Cal. App.3d 454, 461-62, 121 Cal. Rptr. 906, 911-12 (1975), *cert. denied,* 425 U.S. 907 (1976). In the instant case the court below, mistakenly we believe, read this Court's remand in *Mattz* as making state jurisdiction over on-reservation fishing an "open question," 86 Wn.2d at 668, 548 P.2d at 1063, Pet. Cert. App. B-7, then proceeded to resolve it against the tribe. The decision thus misreads *Mattz,* misconstrues the scope of the remand in *Puyallup II,* and contradicts other settled principles of Indian law. All are sufficient reasons to require correction here.

II

Indian Fishing, Even When Off-Reservation, Can Be Curtailed by the State Only Upon a Compelling Justification of Conservation Necessity

Ironically, the decision of the Supreme Court of Washington has transformed this Court's reversal in *Puyallup II* of the Game Department's consistent refusal to recognize Indian rights into an instrument for eroding those rights still further by summary use of state powers. Indeed, the precise holding of this Court in *Puyallup II,* that a ban on Indian net fishing offends the treaty, is repudiated by the court below, 86 Wn.2d at 671, 678-80, 687, 548 P.2d at 1065, 1068-70, 1074, Pet. Cert. App. B 13-14, 26-28, 30-31, 43, with the wholly understandable expectation that the tribe would be forced to seek redress here.

Puyallup I makes clear that off-reservation Indian treaty fishing may be regulated by the state in the interest of conservation. 391 U.S. at 396 n.11, 398.[17] The state "must demonstrate that its regulation is a reasonable and necessary conservation measure, . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine* v. *Washington,* 420 U.S. 194, 207 (1975) (emphasis in original), citing *Department of Game* v. *Puyallup Tribe (Puyallup II),* 414 U.S. 44 (1973); *Tulee* v. *Washington,* 315 U.S. 681, 684 (1942). While the Court in *Antoine* specifically declined to embrace the familiar compelling state interest test to scrutinize state closures of off-

[17] Even this concession of state power is a close one, resting as it does on the assumption that the Article III reservation of federal treaty rights "in common with" citizens of the territory is non-preemptive. *See* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 Wash. L. Rev. 207 (1972).

reservation Indian fisheries, 420 U.S. at 207; *see* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972), it is clear, we submit, that state conservation closures must be strictly justified, carefully tailored, and applied to Indians only if necessary. That is the standard presently governing all western Washington off-reservation Indian treaty fishing, *United States* v. *Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), as well as the Columbia River fisheries. *See Sohappy* v. *Smith,* 529 F.2d 570 (9th Cir. 1976).

By eschewing this standard of conservation necessity, the decision below would be wrong if applied to an off-reservation fishery, and is twice wrong applied to an on-reservation fishery. In its vital particulars, the decision of the Washington Supreme Court authorizes the Game Department to estimate the size of the returning natural and hatchery runs,[18] identify 45 percent of the harvestable run as the tribal share, and enforce that allocation by closures on-reservation without regard to conservation necessity. That is exactly what happened during the winters of 1975 while the case was *sub judice* before the Washington Supreme Court and of 1976 while the case was pending here. *See* p. 8-9, *supra.* In 1975 the trial court chose to invoke its continuing jurisdiction, recompute downwards

[18] The Game Department admits an inability to make run size predictions. (App. 53; R. 380-81, 775). The chief witness for the Department conceded that his figures on natural run size had "decided limitations" and that to allocate the fishery pursuant to court order "in a meaningful way" would require "broader information and more complete information which could be obtained through a special designed effort to do so." (App. 51; R. 352; *see* 353, 696-97, 724-25).

the tribal share (from 3,310 fish to 2,866 fish) and order an on-reservation closure without a colorable conservation justification. The same exercise was repeated in 1976, except that the tribal share triggering injunctive relief had shrunk to 670 fish.

By reading *Antoine* and *Puyallup I* as guaranteeing Indian access to their traditional fishing grounds but not necessarily to the fish swimming by, *see* 86 Wn.2d at 676, 548 P.2d at 1068, Pet. Cert. App. B-23, the Washington Supreme Court unmistakably reads the constraints out of this Court's qualified recognition of a state power to interdict off-reservation Indian fisheries posing a genuine threat to the perpetuation of a particular run of fish. Indeed, the opinion below, while purporting to subject the Indian fishery to the same regulatory regime as the nontreaty fishery,[19] does not even attempt to justify the constraints approved as "conservation" measures. The position, indeed, is simply a rerun of the argument made and rejected seventy years ago in *United States* v. *Winans,* 198 U.S. 371, 379 (1905), where it was urged that Indian treaty rights "confer[red] only such rights as a white man would have." It is hardly radical to suggest that the state regulatory measures invalidated in *Winans,* not to mention *Antoine* and *Tulee* v. *Washington,* 315

[19] Ironically, in a collateral attack on the rulings of Judge Boldt by non-Indian commercial fishing interests the Washington Supreme Court has left open the issue of whether the state is empowered to implement the federal decision by curtailing nontreaty fishing to allow escapement to the traditional grounds of the tribes. *See Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson,* 87 Wn.2d 417, —, 553 P.2d 113, 114 (1976), *petition for rehearing granted,* — Wn.2d — (1976). The decision in the instant case thus approves a state power on-reservation against the Indians that is said to be in doubt applied off-reservation to non-Indians.

U.S. 681 (1942), could be reinstated through the simple expedient of characterizing them as measures "to support the state government in its efforts to conserve fisheries resources."

The decision below is improved not at all by the suggestion that the treaty must be rendered a nullity because "equal protection is denied when similarly situated persons, *e.g.*, all state citizens including Indians, [are] treated differently by allowing only a certain class to fish with nets." 86 Wn.2d at 680, 548 P.2d at 1070, Pet Cert. App. B-30. The claim that legislation treating Indians separately amounts to invidious discrimination was put to rest decisively by this Court's unanimous decision in *Morton* v. *Mancari,* 417 U.S. 535, 551-55 (1974), upholding Indian employment criterion provisions. The rationale, embraced by yet another unanimous decision last term, *see Fisher* v. *District Court,* 424 U.S. 382, 390-91 (1976) (per curiam), is that the different treatment derives from the quasi-sovereign status of the tribe and advances a solemn congressional policy of tribal self-government in the Indian Reorganization Act of 1934. That Indians may fish with nets under the terms of the Treaty of Medicine Creek is a small price to pay for the land cessions enjoyed by all citizens of the state today,[20] and it is a price Congress still deems indispensable to the survival of this small tribal entity.

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[20] *See Puyallup Tribe* v. *United States,* 17 Ind. Cl. Comm'n 1 (1966); *Nisqually Tribe* v. *United States,* 29 Ind. Cl. Comm'n 432 (1973) (holding that token payments for lands ceded by the Indians under the Treaty of Medicine Creek were "unconscionable" within the meaning of Section 2 of the Indian Claims Commission Act). The Puyallup Tribe's claim is still pending.

III

Tribal Sovereign Immunity Precludes State Courts From Adjudicating Tribal Community Fishing Rights

By ruling that tribal fishing rights extended to none of the hatchery fish and less than half of the harvestable natural steelhead found in the Puyallup River, the Washington Supreme Court effectively extinguished tribal community fishing rights in more than three-fourths of the harvestable steelhead in the river. By doing so and by going further to authorize a continuing administrative authority over tribal fishermen and catch, the court grossly exceeded its jurisdiction and offended principles of tribal sovereign immunity that are firmly established, misapplying in the process this Court's decision in *Puyallup I.*

Ordinarily, Indian tribes enjoy an immunity coextensive with that afforded the United States. *E.g., United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940); *Crowe* v. *Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1233 (4th Cir. 1974); *Cherokee Nation* v. *Oklahoma,* 461 F.2d 674, 681 (10th Cir.), *cert. denied,* 409 U.S. 1039 (1972). The policy justifications, understandably, derive from the historical political independence of the tribes and Congress' recognition of it. If tribal sovereign immunity operates to bar a suit against a tribe for negligence claims growing out of the operation of a bridge on-reservation, *Haile* v. *Saunooke,* 246 F.2d 293 (4th Cir.), *cert. denied,* 355 U.S. 893 (1957), or of a tribal resort, *Morgan* v. *Colorado River Indian Tribe,* 103 Ariz. 425, 443 P.2d 421 (1968), or of the conduct of an election, *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967), then one wonders why it does not preclude a lawsuit

that strikes heavily at the income of tribal fishermen by curtailing their opportunities to make a living. Indeed, were a state agency to file suit against the tribe tomorrow in the Pierce County Superior Court, State of Washington, seeking an allocation, let us say, of the Puyallup River coho salmon run, we believe the suit would be subject to summary dismissal on sovereign immunity grounds. The result should not be different where, as here, an action initiated more than thirteen years ago gradually evolves into an attempted adjudication of tribal community fishing rights.

We find nothing that distinguishes the sovereign immunity cases cited above and others [21] from the present situation. There is surely no draconian rule allowing the piling on of claims against an Indian tribe once an initial pleading is found to survive sovereign immunity objections. *Cf.* 6 C. Wright & A. Miller, Federal Practice and Procedure §§ 1588, 1592 (1971). Nor can there be found a Congressional waiver of objections against suit which is a more traditional mode of circumventing sovereign immunity objections. *See Dugan* v. *Rank,* 372 U.S. 609 (1963); *United States* v. *District Court for the County of Eagle,* 401 U.S. 520 (1971); *Namekagon Development Co.* v. *Bois Forte Reservation Housing Authority,* 517 F.2d 508, 510 (8th Cir. 1975); *Fontenelle* v. *Omaha Tribe of Nebraska,* 430 F.2d 143 (8th Cir. 1970); 25 Stat. 444 (1908). This Court more than once has insisted upon a "clear relinquishment" of sovereign immunity insofar

[21] *E.g., Turner* v. *United States,* 248 U.S. 354 (1919); *Lomayaktewa* v. *Hathaway,* 520 F.2d 1324 (9th Cir. 1975), *cert. denied,* 425 U.S. 903 (1976) (action to void coal mining lease); *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975) (action to cancel a 99 year lease between the tribe and a developer); *Maryland Casualty Co.* v. *Citizens Nat'l Bank,* 361 F.2d 517 (5th Cir.), *cert. denied,* 385 U.S. 918 (1966).

as the United States is concerned, *Dalehite* v. *United States,* 346 U.S. 15, 31 (1953); *cf. Hancock* v. *Train,* 96 S. Ct. 2006, 2012-13 (1976), and would demand no less a showing for the tribes whose rights have been long protected against ambiguous and unarticulated waivers. *See, e.g., Antoine* v. *Washington,* 420 U.S. 194, 199-200 (1975). Not only has the Congress taken no action to subject the tribes to suits in state courts to curtail natural resource holdings, it has acted positively through Public Law 280 to protect fishing rights from a state's judicial process. *See* pp. 22-23, *supra.* It goes without saying that the decision to subject unwilling tribes to state court adjudications of their treaty rights as regards any contested resources (timber, coal, oil, gas, fish, water or otherwise) would be a startling proposition, and one not likely undertaken by the Congress.

The tribe's objection on this point was thought by the Washington Supreme Court, 86 Wn.2d at 668, 548 P.2d at 1063, Pet. Cert. App. B-6, to be answered fully by the ruling of this Court in *Puyallup I* where sovereign immunity defenses were answered as follows: "This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts." 391 U.S. at 396 n.11, citing among other cases, *DeMarrias* v. *South Dakota,* 319 F.2d 845 (8th Cir. 1963).[22]

[22] *DeMarrias* was overruled by *United States ex rel. Feather* v. *Erickson,* 489 F.2d 99 (8th Cir. 1973) (holding that the Lake Traverse Indian Reservation had not been terminated), *rev'd sub nom. DeCoteau* v. *District County Court,* 420 U.S. 425 (1975) (solely on the ground that the reservation had been terminated).

The Washington Supreme Court, we believe, has misread this narrow rejection of sovereign immunity claims in the early phases of this litigation to make the tribe a virtual prisoner in the state courts, answerable to any claims regarding fishing that happen to be asserted by the state or by any intervenor. A number of factors combine to contradict this reading of *Puyallup I*: first, the Ninth Circuit's decision confirming the existence of the reservation has transformed this litigation from what was presumed to be an off-reservation case to what is known to be an on-reservation case.[23] Wholly apart from the status of the reservation the analogue of the prosecution of individual Indians is exploded thoroughly by a recognition that what has been accomplished is to exempt a substantial segment of the steelhead in the river from the terms of the federal treaty. Defendants are the tribe and its chief executive officer as representative of the tribe, and the rights adjudicated are community treaty rights. At this third trial individual tribal fisherman were not named in the complaints, were not represented by counsel, and did not even appear as witnesses. Indeed, the instant case presents solely federal issues without even a colorable claim of a violation of state law. Allegations of violence during the fishery were included in the Department's amended pleading but were repudiated by a Department witness at trial (R. 1103-05) and are wholly unsubstantiated by the record. No conservation justification is offered for the allocation decisions and none exists. What the court below has done, purely and simply, is to resolve basic issues of federal treaty

[23] This Court always has understood *Puyallup I* to be applicable only to off-reservation activity. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973). *Compare* note 22, *supra*.

rights adversely to the tribe over continuing sovereign immunity objections. This is sufficient reason alone for reversal here.

IV

The State and the Game Department Are Barred by Principles of Collateral Estoppel from Relitigating the Issue of State Power To Regulate On-Reservation Fishing.

The decision of the court below is in clear conflict with the decision of the Ninth Circuit confirming the existence of the Puyallup Reservation, *United States* v. *Washington*, 496 F.2d 620 (9th Cir.) (per curiam), *cert. denied*, 419 U.S. 1032 (1974), and of Judge Boldt's decisions, also affirmed by the Ninth Circuit, allocating the Indian and non-Indian catch. *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The Ninth Circuit decision, holding that the reservation still exists, *a fortiori* resolves the question of the tribe's exclusive power to regulate the fishing of its members on-reservation. Indeed, before the Ninth Circuit the state contested "the continued existence of the Puyallup Indian Reservation and as a consequence, the right of the Puyallup Tribe of Indians to fish, free from state interference, on the part of the Puyallup River lying within the reservation." 496 F.2d at 620. The state now returns to this Court to defend a decision which approves a state interference with on-reservation fishing so decisive in its implementing particulars that it leads to closure orders aimed at the tribal council.

The law of collateral estoppel is well settled, and ordinarily prevents a party from relitigating in another forum issues of fact and law actually litigated and determined by a prior judgment. Restatement of Judg-

ments § 68; Restatement (Second) Judgments § 68 (Tent. Draft No. 1, 1973); *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 840-50 (1952); *see City of Tacoma* v. *Taxpayers,* 357 U.S. 320 (1958); *International Ass'n of Machinists & Aerospace Workers* v. *Nix,* 512 F.2d 125, 132 (5th Cir. 1975). Here, the state has litigated to a conclusion in the federal courts factual and legal questions regarding reservation status and the consequent power of the state to regulate the tribal fishery on the reservation. The district court in the reservation case had granted the state's motion confirming its power to regulate the taking of fish on the river by tribal fishermen. In its brief on appeal the state fully argued the reservation termination and regulatory power questions,[24] only to be told by the Ninth Circuit that the reservation still exists and that the tribe could fish "free from state interference" within its boundaries. 496 F.2d at 620. Yet the basic pleading upon which this case was tried for a third time prayed for a declaration that the Game Department possesses "the sole and exclusive authority to promulgate regulations for the taking of steelhead trout" by members of the Puyallup Tribe "in the bay, the river, and its tributaries." (App. 5).

The decision of the court below, by cooperating in this relitigaion, permits the state to reassert an authority previously withheld by a fully contested federal

[24] The first two issues presented for review, according to the Brief for Appellee, p. 3, *United States* v. *Washington,* No. 73-1793 (9th Cir.) were:

A. Whether the Cushman Act of 1904 indicated Congressional intent to terminate the Puyallup Indian Reservation?

B. Whether the descendents of the Puyallup Tribe of Indians own any uplands, the river bed, or the fish in the Puyallup River where it runs through the original 1873 boundaries.

judgment. By holding that state regulation may ensue despite reservation status, the tribe's long awaited success in winning judicial recognition of the reservation is rendered a nullity. Too soon it appears the tribe was led to believe that the Ninth Circuit settled, once and for all, the question whether the conveyance to private ownership of most of the lands within the reservation extinguished also valuable on-reservation fishing rights without tribal consent, without compensation, and without congressional or executive approval.

As this litigation approaches its fourteenth anniversary, the Puyallup Tribe urges the Court to consider the practices sought to be validated here against the pattern of prior arguments whose only constancy is a dogged pursuit of a diminished Indian fishery. State authorities have argued, at various times in the litigation, that the Puyallup Tribe was defunct and its members without rights under the treaty, that the treaty is but a scrap of paper entered into without consideration from "a conquered people" having no "right or title to anything," *Dep't of Game* v. *Puyallup Tribe (I),* 70 Wn.2d 245, 249, 422 P.2d 754, 756 (1967), that the state has full power to regulate on-reservation because the reservation does not exist, 70 Wn.2d at 253, 422 P.2d at 759; *see Satiacum* v. *Washington,* 414 U.S. 1 (1973) (per curiam) (holding that the federal question of the existence of the Puyallup Reservation had been decided unnecessarily), that the power to regulate off reservation for conservation purposes includes the power to preclude totally Indian net fishing in favor of sport fishing, *Dep't of Game* v. *Puyallup Tribe* (II), 414 U.S. 44 (1973), and now, that despite the existence of the reservation, a state court may proceed anyway to adjudicate on-reservation treaty fishing rights, allocate

the catch, and enforce the allocation. It is time to call a halt to this litigation distinguished only by a proliferation of theories designed to diminish federally protected rights.

V

The Issue of Treaty Entitlement to Hatchery Steelhead Is Not Before the Court and Is Unnecessary to the Decision

The petition for certiorari sought review of the single issue of state power to regulate on-reservation fishing. Usually, review here is confined to the questions raised in the petition, *see, e.g., J.I. Case Co.* v. *Borak,* 377 U.S. 426, 428 (1964); *Irvine* v *California,* 347 U.S. 128, 129 (1954); *General Talking Pictures Corp.* v. *Western Elec. Co.,* 304 U.S. 175, 177 (1938); Sup. Ct. Rules 23 (1)(c), 40(1)(d)(2), and we detect none of the extraordinary circumstances that conceivably could encourage the Court to depart from that principle. *See* R. Stern & E. Gressman, Supreme Court Practice 298-99 (4th ed. 1969). Respondents, however, by the filing of cross-petitions rejected as untimely, note 1 *supra,* by their responses to the petition, and by their record designations for inclusion in the Appendix have made clear an intention to argue here the issue of treaty applicability to hatchery fish. Out of an excess of caution, therefore, we consider it necessary to elaborate briefly on our reasons for believing the issue should not be considered here.

We have argued that the Puyallup tribal steelhead fishery for all practical purposes occurs exclusively on-reservation and thus beyond the regulatory grasp of the state. (Part I, *supra*). The point, we believe, already has been settled by prior litigation, (Part IV, *supra*), and is confirmed by this Court's prior Indian

fishing decisions. (Part II, *supra*). Counsel for the state recognizes that any distinction between hatchery and natural fish "is only material to the off-reservation fishery" (App. 21) which happens to be no longer involved in the case. Regardless of the status of the reservation, we submit it is similarly clear that settled principles of tribal sovereign immunity foreclose a suit in the state courts aiming to exempt from the treaty a sizeable supply of available fish. (Part III, *supra*). Thus for these twin legal reasons of reservation status and sovereign immunity, we believe the courts below were without power to decree tribal entitlement to the steelhead run (whether hatchery or natural) and to enforce any allocation so decreed. Acceptance of this view forecloses any need for inquiring into the basis of any allocation.

Intensely practical considerations reinforce the inappropriateness of this Court addressing the natural-hatchery issue at this time. First, presently pending in the federal district court for the Western District of Washington is Phase II of *United States* v. *Washington* where the parties are litigating actively the entitlement to hatchery fish of all species asserted by all tribes under all treaties in all western Washington waters (p. 5, *supra,*) Second, the instant case, although tried without a jury, produced repeated rulings excluding tribal testimony and exhibits relevant to treaty entitlement to hatchery reared fish. This was true as to evidence offered to show extensive federal funding of western Washington steelhead smolts and hatchery facilities (R. 324, 328, 702-03, 717, 736-40, 744, 989-1004; Exhs. 74-C, 74-K and 74-M), competition for survival between naturally reared steelhead and hatchery plants (R. 328-31; Exh. 74-E, 74-F), and environmental degradation

ATTACHMENT

TREATY OF MEDICINE CREEK AND STATUTES

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Treaty of Medicine Creek. 10 Stat. 1132 (1854)

WHEREAS a treaty was made and concluded on the Shenah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

• • • •

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: . . . . all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens,

and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Public Law 280, § 2, 67 Stat. 588 (1953), codified at 18 U.S.C. § 1162 (1970), as amended:

§ 1162. State Jurisdiction Over Offenses Committed by or Against Indians in the Indian Country

* * * *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The Civil Rights Act of 1968, § 401, 25 U.S.C. § 1321 (1970):

§ 1321. Assumption by State of Criminal Jurisdiction—Consent of United States; Force and Effect of Criminal Laws

* * * *

Alienation, Encumbrance, Taxation, and Use of Property; Hunting, Trapping, or Fishing

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against

alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Indian Reorganization Act of 1934, § 16, 25 U.S.C. § 476 (1970):

§ 476. Organization of Indian Tribes; Constitution and Bylaws; Special Election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, in-

terests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.